Hashim bin Hj Jasin v Pegawai Pengurus Pilihanraya Mohd Daud bin Abdul Hamid & Ors

HIGH COURT (KANGAR) — ELECTION PETITION NO 26–1 OF 2008
ZAINAL ADZAM J
18 JUNE 2008

Constitutional Law — Courts — Jurisdiction — Inherent jurisdiction — Whether jurisdiction of courts only limited to procedural law to prevent injustice or abuse of courts' process — Whether inherent jurisdiction of courts may be exercised in matters involving substantive law — Whether courts' exercise of inherent jurisdiction in matters involving substantive law tantamount to encroachment into powers of Legislature

Election — Avoidance of election — Grounds — Mistake in counting of votes — Whether a 'non-compliance' affecting result of election — Election Offences Act 1954 s 32(b)

Election — Election court — Powers and jurisdiction of — Inherent jurisdiction — Whether court's inherent jurisdiction confined to procedural law — Whether court could exercise inherent jurisdiction in matters involving substantive law

Election — Election court — Powers and jurisdiction of — Substantive statutory provision allowing election court to declare a particular candidate duly elected or returned deleted by amendment — Whether election court empowered to make such declaration post-amendment — Whether election court could resort to inherent jurisdiction to make such declaration post-amendment — Election Offences Act 1954 s 35(c) — Election Offences Act (Amendment) 2002

Election — Petition — Reliefs which may be claimed — Whether reliefs provided under s 35 of the Election Offences Act 1954 disjunctive or conjunctive in nature — Declaration that particular candidate not duly elected or returned — Effect of — Whether necessary for declaration that election void — Election Offences Act 1954 s 35

In the recent general elections the returning officer ('first respondent') for the constituency of DUN N15, Sanglang, Perlis, officially declared the third

respondent as the duly elected representative with a majority of 149 votes. The petitioner alleged that first respondent had made a mistake when totaling the number of votes from the Form 14s of all polling stations. This mistake, said the petitioner was in breach of reg 25D(5) of the Elections (Conduct of Elections) Regulations 1981. The petitioner argued that a proper counting of Form 14s from all 18 polling stations showed that the petitioner had in fact won with a majority of 47 votes. As such, the petitioner argued that the election was not conducted in compliance with the provisions laid down by law and such non-compliance affected the result of the election under s 32(b) of the Election Offences Act 1954 ('the Act'). The petitioner applied for, inter alia, a declaration that the third respondent was not duly elected or ought not to have been elected; and a declaration that the petitioner ought to have been elected or returned. The third respondent submitted to the effect that the mistake by the first respondent was not a non-compliance of s 32(b) of the Act, as alleged by the petitioner. The first and second respondents subsequently conceded that the first respondent did in fact make a mistake in the counting of the Form 14. All three respondents conceded that the third respondent was wrongfully declared as duly elected in the elections. The High Court however felt obliged to dispose of the third respondent's submissions. It also had to decide whether the petitioner could be declared as duly elected or returned, in the light of amendments to the Act.

Held, granting an order that the third respondent was not duly elected or ought not to have been elected:

(1) A mistake in the counting and the totaling of votes would directly affect the result of the election. Therefore, such mistake must be a non-compliance and a valid ground for a declaration that the candidate so returned was not duly elected or ought not to have been returned under s 35(b) of the Act (see para 3).

(2) The election court could not declare the petitioner duly elected or returned, as prayed for by the petitioner. This was because the enabling provision that would have authorised the court to grant the prayer — s 35(c) — was deleted by Act A1177 with effect from 16 January 2003. Since Parliament in its wisdom had deleted the substantive provision of s 35(c) of the Act, it could not be said that there was a lacuna in the law that could be overcome by using the inherent powers of the court. The courts cannot reinstate a statutory provision that Parliament has deleted. It is not within the powers of the court to rewrite, alter, vary or add on to any law laid down by statute (see para 10).

(3) The court could not resort to its inherent power or jurisdiction to correct any injustice to the petitioner by declaring the petitioner duly elected, as urged by the petitioner. Inherent power or jurisdiction of the

court, as provided for under O 92 r 4 of the Rules of the High Court 1980 is a procedural rule to prevent injustice or an abuse of the process of the court. It is not be a part of substantive law. To go beyond that would tantamount the court encroaching into the power of the Legislature (see para 5).

(4) Although the election petition form prescribed by r 4(4) of the Election Petition Rules 1954 contains a clause that reads 'the said EF was duly elected and ought to have been returned', when s 35(c) of the Act was deleted, that clause being part of a subsidiary legislation of the Act immediately became ultra vires the Act in that it provided for a relief that was no longer available under s 35 of the Act. That clause remains due to an oversight during the deletion of s 35(c). It is now of no effect by virtue of s 23 of the Interpretation Acts 1948 and 1967. Parliament must have considered any 'hardship' or even 'injustice' arising when it deleted s 35(c) of the Act. The subject of election after all has a direct relationship to the membership of Parliament itself. All matters relating to it is within the jurisdiction of Parliament and is therefore best determined by Parliament (see paras 11–13).

(5) All the available reliefs provided under s 35 of the Act are to be read disjunctively and not conjunctively. Although the elections court did not declare the election void under s 35(a) of the Act since no such declaration was sought by the petitioner, the effect of the court declaring that the third respondent was not duly elected or ought not to have been elected (viz, order-in-terms of prayer 1 of petitioner's petition), effectively meant that there was a vacancy in the constituency of DUN N15, Sanglang, Perlis. When there is a vacancy in the Dewan Undangan Negeri, that vacancy must be filled within 60 days from the date it is established by the Election Commissions that there is a vacancy as provided by art 55(5) of the Laws of The Constitution of Perlis (see paras 14–15).

[Bahasa Malaysia summary

Dalam pilihanraya umum baru-baru ini pegawai pengurus ('responden pertama') untuk kawasan pilihanraya DUN N15, Sanglang, Perlis, telah dengan rasminya mengisytiharkan responden ketiga sebagai wakil yang dilantik dengan sebanyak 149 undi majoriti. Pempetisyen mengatakan bahawa responden pertama telah membuat kesilapan semasa mengira keseluruhan jumlah undian daripada Borang 14 untuk semua stesyen mengundi. Kesilapan ini, kata pempetisyen adalah menyalahi peraturan 25D(5) Peraturan-Peraturan Pilihan Raya (Penjalanan Pilihan Raya) 1981. Pempetisyen berhujah bahawa pengiraan betul Borang 14 daripada kesemua stesyen mengundi menunjukkan bahawa pempetisyen sebenarnya telah

memenangi 47 undian majoriti. Oleh itu, pempetisyen berhujah bahawa pilihanraya itu tidak dikendalikan menurut peruntukan-peruntukan yang ditentukan oleh undang-undang dan ketidakpatuhan sebegini menjejaskan keputusan pilihanraya di bawah s 32(b) Akta Kesalahan Pilihanraya 1954 ('Akta'). Pempetisyen telah memohon, antara lain, satu deklarasi agar responden ketiga tidak diundi atau tidak patut diundi; dan satu deklarasi bahawa pempetisyen patut dipilih atau diundi. Responden ketiga menghujahkan bahawa kesilapan oleh responden pertama bukan ketidakpatuhan s 32(b) Akta, seperti yang dikatakan oleh pempetisyen. Responden-responden pertama dan kedua kemudiannya telah mengaku bahawa responden pertama sememangnya telah membuat kesilapan dalam mengira Borang 14 itu. Ketiga-tiga responden mengaku bahawa responden ketiga telah diisytiharkan dengan salah sebagai yang telah dipilih dalam pilihan raya itu. Mahkamah Tinggi walau bagaimanapun berasa terpaksa menyelesaikan penghujahan responden ketiga. Ia juga perlu memutuskan sama ada pempetisyen boleh diisytiharkan sebagai yang telah dipilih atau diundi, dengan mengambilkira pindaan-pindaan kepada Akta.

Diputuskan, memberikan perintah agar responden ketiga tidak dipilih atau tidak patut dipilih:

(1) Satu kesilapan dalam pengiraan dan mengira keseluruhan undian akan secara langsung menjejaskan keputusan pilihanraya. Oleh itu, kesilapan sebegini hendaklah merupakan suatu ketidakpatuhan dan alasan sah untuk deklarasi bahawa calon yang telah diundi tidaklah dipilih atau tidak patut diundi di bawah s 35(b) Akta (lihat perenggan 3).

(2) Mahkamah pilihanraya tidak boleh mengisytiharkan pempetisyen sebagai telah dipilih atau diundi, seperti yang dipohon oleh pempetisyen. Ini adalah kerana peruntukan memberi bidang kuasa yang memberi kuasa kepada mahkamah untuk membenarkan permohonan — s 35(c) — telah dipotong oleh Akta A1177 berkuat kuasa dari 16 Januari 2003. Memandangkan Parlimen dalam kewajarannya telah memotong peruntukan substantif s 35(c) Akta, ia tidak boleh dikatakan bahawa terdapat lacuna dalam undang-undang yang boleh diatasi dengan menggunakan kuasa sedia ada mahkamah. Mahkamah tidak boleh memasukkan semula peruntukan statutori yang Parlimen telah potong. Ia bukan dalam kuasa mahkamah untuk menulis semula, pinda, ubah atau tambah kepada mana-mana undang-undang yang ditetapkan oleh statut (lihat perenggan 10).

(3) Mahkamah tidak boleh menggunakan kuasa atau bidang kuasa sedia adanya untuk membetulkan apa-apa ketidakadilan kepada pempetisyen dengan mengisytiharkan pempetisyen telah dipilih, seperti yang didesak oleh pempetisyen. Kuasa atau bidang kuasa sedia ada mahkamah,

seperti yang diperuntukkan di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 merupakan kaedah prosedur untuk mengelakkan ketidakadilan atau penyalahgunaan proses mahkamah. Ia bukan sebahagian daripada undang-undang substantif. Lebih daripada ini menjadikan mahkamah seperti menceroboh kuasa badan penggubal (lihat perenggan 5).

(4) Meskipun borang petisyen pilihanraya yang ditetapkan oleh k 4(4) Peraturan-Peraturan Petisyen Pilihanraya 1954 mengandungi klausa yang berbunyi 'the said EF was duly elected and ought to have been returned', apabila s 35(c) Akta dipotong, klausa itu yang merupakan sebahagian perundangan kecil Akta serta merta menjadi ultra vires Akta itu yang mana ia memperuntukkan relief yang tidak lagi sedia ada di bawah s 35 Akta. Klausa itu masih wujud disebabkan kesilapan semasa s 35(c) dipotong. Ia kini tidak berkuasa kuasa menurut s 23 Akta Tafsiran 1948 dan 1967. Parlimen sudah pasti mengambilkira sebarang 'hardship' atau 'injustice' yang akan timbul apabila ia memotong s 35(c) Akta. Perkara berhubung pilihanraya itu secara langsung mempunyai kaitan dengan keahlian Parlimen itu sendiri. Semua perkara berkaitannya adalah dalam bidang kuasa Parlimen dan oleh itu sebaik-baiknya ditentukan oleh Parlimen (lihat perenggan 11–13).

(5) Semua relief sedia ada yang diperuntukkan di bawah s 35 Akta hendaklah dibaca berasingan dan bukan bersama. Meskipun mahkamah pilihanraya tidak mengisytiharkan pilihanraya itu tidak sah di bawah s 35(a) Akta memandangkan tiada deklarasi sedemikian dipohon oleh pempetisyen, kesan mahkamah mengisytiharkan bahawa responden ketiga tidak dipilih atau tidak patut dipilih (melalui permohonan 1 perintah menurut petisyen pempetisyen), secara efektifnya bermaksud bahawa terdapat kekosongan dalam kawasan pilihanraya DUN N15, Sanglang, Perlis. Apabila terdapat kekosongan di Dewan Undangan Negeri, kekosongan itu hendaklah diisi dalam tempoh 60 hari dari tarikh ia ditubuhkan oleh Suruhanjaya Pilihanraya bahawa terdapat kekosongan seperti yang diperuntukkan oleh perkara 55(5) Undang-Undang Perlembagaan Perlis (lihat perenggan 14–15).]

Notes

For a case on powers and jurisdiction of election court generally, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) para 1974.

For cases on grounds on avoidance of election generally, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1966–2066.

For cases on jurisdiction of courts, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1927–1944.

For cases on reliefs which may be claimed for petition generally, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1990–2065.

Cases referred to

Delcont (M) Sdn Bhd v Motor Sport International Ltd [1996] 5 MLJ 51 (refd)
Lee Chong Meng v Election Commission Malaysia & 2 Ors Malaysian Election Laws, Vol III 2003, p 1564 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Rajesselvi Sinnakaruppan [2001] 4 CLJ 535 (refd)
SBSK Plantations Sdn Bhd v Dynasty Rangers (M) Sdn Bhd [2002] 1 MLJ 326 (refd)
Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, intervener) [1995] 2 MLJ 421 (refd)

Legislation referred to

Election Act 1958 s 12
Election Offences Act 1954 ss 32, 32(2), 32(a), 32(b), 32(c), 35, 35(b), 35(c), 36, 36(2), 36(2)(a), 42(1)
Election Petition Rules 1954 r 4(4)
Elections (Conduct of Elections) Regulations 1981 reg 25D(2), 25D(5), 25D(7)
Interpretation Acts 1948 and 1967 s 23, 23(1)
Rules of the High Court 1980 O 92 r 4

Mohamed Hanipa bin Maidin (Zulmi bin Sabri and Aqbal Shiffudin bin Adnan Sallehudin with him) (Zul Jaafar Ibrahim & Co) for the petitioner.
Kamaludin bin Md Said (Rozi bt Bainon and Wan Roslan bin Wan Ismail with him) (Senior Federal Counsel and Federal Counsel, Attorney General's Chambers) for the first and second respondents.
Jegathesan a/l Karupiah (Albert a/l Antoni Tass with him) (Karupiah & Co) for the third respondent.

Zainal Adzam J:

[1] In the general election held on 8 March 2008 for the constituency of Dewan Undangan Negeri N15, Sanglang, Perlis, the official result declared by the first respondent (the returning officer) was that the third respondent obtained 3,384 votes and the petitioner obtained 3,235 votes. The first respondent thereupon declared the third respondent as duly elected with a majority of 149 votes. The petitioner alleged that the first respondent was in breach of reg 25D(5) of the Elections (Conduct of Elections) Regulations 1981 ('Regulations') when in the process of officially totalling the number of votes of the form 14 from all the polling stations he made a mistake. According to the petitioner from all the 18 Form 14 the record showed that the petitioner obtained a total of 3,333 votes while the third respondent obtained 3,206 votes whereby showing that the petitioner had actually won by a majority of 47 votes. Based on the wrong totalling by the first respondent

he officially declared the third respondent as duly elected under reg 25D(7) of the Regulations. As such the petitioner argued that the election was not conducted in compliance with the provisions laid down by law and such non-compliance affected the result of the election under s 32(b) of the Election Offences Act 1954 ('the Act'). The petitioner prayed for the following reliefs:

(1) a declaration that the third respondent was not duly elected or ought not to have been elected;

(2) a declaration that the petitioner ought to have been elected or returned; and

(3) determination and directions under s 36 of the Act.

[2] The third respondent's main argument is that the mistake by first respondent as alleged by the petitioner is not a non-compliance of s 32(b) of the Act. Senior federal counsel on behalf of the first and second respondents however conceded that first respondent did make a mistake in the official totalling of the 18 Form 14 resulting in the third respondent being wrongfully declared as duly elected. In the face of that admission, the third respondent, to his credit, through his counsel conceded that he was wrongfully declared as duly elected in the said election. However, the submission on behalf of the third respondent need to be disposed of.

[3] Wrongly (whether intentionally, unintentionally or negligently) totalling the number of votes by the returning officer from all the Form 14 submitted by the presiding officers of all the polling stations must by implication be a non-compliance of reg 25D(5) of the Regulations. To protect the sancity and purity of the election process it is essential that the actual counting by the Presiding Officers under reg 25D(2) of the Regulations of each and every valid votes casted at all the polling stations and the subsequent official totalling of the number of votes recorded in all Form 14 for each candidate by the returning officer under reg 25D(5) of the Regulations be done properly and without any mistake whatsoever. These two provisions cannot be construed in any other way as the two process goes to the crux of the election. A mistake in the counting and the totalling of votes would directly affect the result of the election. That is apparent beyond any argument. A mistake in the counting and totalling of votes must therefore be a non-compliance and a valid ground for a declaration that the candidate so returned was not duly elected or ought not to have been returned under s 35(b) of the Act.

[4] As stated earlier the petitioner further prayed (prayer 2) for a declaration that the petitioner ought to have been elected or returned. Counsel on behalf of the petitioner acknowledged that s 35(c) of the Act

which read '... a declaration that any candidate was duly elected and ought to have been returned ...' was deleted by Act 1177 with effect from 16 January 2003. However they argued that it was deleted as a result of a decision in the election petition case of *Lee Chong Meng v Election Commission Malaysia & 2 Ors* Malaysian Election Laws, Vol III 2003, p 1564 by Tunku Sofia Jewa) where the court declared the losing candidate in the election as duly elected as the candidate (the third respondent) who was returned was disqualified by a previous conviction. The petitioner argued that in the present case if the court granted prayer 2, the court is not electing any candidate but merely confirming the actual winner as the person duly elected. This would correct the 'injustice' to the petitioner and the court can do so under its inherent powers.

[5] Inherent powers or jurisdiction of the court is a procedural rule to prevent injustice or an abuse of the process of the court. The only mention of 'inherent jurisdiction' in law is found in O 92 r 4 of the Rules of the High Court 1980. Therein lies its limitation, viz it cannot be a part of substantive law. To go beyond that would be tantamount to the court encroaching into the power of the Legislature, be it Parliament or the State Legislative Assemblies. There are numerous cases which considered this point directly or indirectly. In *Delcont (M) Sdn Bhd v Motor Sport International Ltd* [1996] 5 MLJ 51, at p 61 the court stated:

> The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal and not a part of substantive law. It must be distinguished from exercise of judicial discretion; and it may be exercised even in circumstances governed by the rules of court ...

[6] In *Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, intervener)* [1995] 2 MLJ 421, at p 430 the court stated:

> In my considered opinion, the inherent jurisdiction of the court under O 92 r 4 cannot be used to deny the plaintiff of any legal right that may be vested in him under r 7(b). Inherent jurisdiction under the rules of court is a procedural rule and is not intended to alter substantive rights ...

[7] In *SBSK Plantations Sdn Bhd v Dynasty Rangers (M) Sdn Bhd* [2002] 1 MLJ 326, at p 340 the court stated:

> Therefore, the defendant is entitled as of right to present a winding up petition against the plaintiff. This is a substantive right conferred upon the defendant by s 217(1)(b) of the Act, a substantive law, and neither O 92 r 4(2) of the RHC, a procedural law, nor the inherent jurisdiction of the court can deprive the defendant of that right or reduce the extend of the right...

[8] In the case of *Rajesselvi Sinnakaruppan* [2001] 4 CLJ 535, at p 543 Syed Ahmad Helmy JC (as His Lordship was then) stated: A

> At p 160 in *Re CHS*, His Lordship Augustine Paul JC clearly emphasised that the inherent jurisdiction under O 92 r 4 is only intended to be exercised to overcome procedural injustice arising from a lacuna in the rules and not to remedy any lacuna in the substantive Act when he stated: B
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> > The inherent jurisdiction of the court under O 92 of the RHC can be exercised in a situation where a lacuna exists in the RHC and where the same causes a procedural injustice in that it does not provide an adequate remedy or remedies and the court is then not only entitled to fill the gap, but is obliged to do so, in order to avoid an injustice (see *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, garnishee* [1990] 1 MLJ 445)). C

[9] Edgar Joseph Jr FCJ in the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, at p 238 in quoting from an article *The Inherent Jurisdiction of the Court* [1970] Current Legal Problems 23 stated: D

> Explaining the relation between the inherent jurisdiction and the rules of court, the learned author says this (at p 50): E
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> > The powers of the court under its inherent jurisdiction are complementary to its powers under rules of court; one set of powers supplements and reinforces the other. The inherent jurisdiction of the court is a most valuable adjunct to the powers conferred on the court by the rules. F

[10] As mentioned earlier the enabling provision which would have authorised this court to grant prayer 2 of the petition was deleted by Act 1177 with effect from 16 January 2003. The effect of the deletion is that the G election petition court is no longer authorised or empowered to declare 'any candidate which ought to be duly elected or returned'. It is immaterial whether the deletion was based on the decision of *Lee Chong Meng* or not. The provision s 32(2) of the Act was a substantive provision and is no more available. Where it is clear that Parliament in its wisdom has addressed the H issue in question by deleting s 32(c) of the Act it cannot be said that there is a lacuna in the law which can be overcomed by using the inherent powers of the court. To do so (in this petition, by granting prayer 2) would mean that this court is reinstating a provision 5 which Parliament in 2003 deemed it necessary to be deleted from the Act. It is certainly not within the powers of I the court to rewrite, alter, vary or add on to any law as laid down by statute.

[11] Counsel for the petitioner in addition argued that s 42(1) of the Act states that the procedure and practice on election petitions shall be regulated

by the Election Petition Rules 1954 and under r 4(4) of that Rules, which prescribes the form of election petition, it is provided among the prayers that can be included in the petition the clause '... or that the said EF was duly elected and ought to have been returned ...'. It was argued that s 35 of the Act should be read together with this provision and as such prayer 2 of the petition is a legitimate prayer which can be granted by this court. The short answer to this is found in s 23(1) of the Interpretation Acts 1948 and 1967 which provides:

> Any subsidiary legislation that is inconsistent with an Act (including the Act which the subsidiary legislation was made) shall be void to the extend of the inconsistency.

[12] When s 32(c) of the Act was deleted that clause being part of a subsidiary legislation of the Act immediately becomes ultra vires the Act in that it provides for a relief that is no longer available in s 32 of the Act. That clause remained obviously due to an oversight during the deletion of s 32(c) but it has become a dead letter and is of no effect by virtue of s 23 of the Interpretation Acts 1948 and 1967.

[13] As to the hardship or even 'injustice' to the petitioner as submitted by his counsels, it must be deemed to be a situation that Parliament had considered when deleting s 32(c) of the Act. The subject of election after all has a direct relationship to the membership of Parliament itself. All matters relating to it is within the jurisdiction of Parliament and is therefore best determined by Parliament. As the law now stands the reliefs which can be granted by an election court are provided by s 35 of the Act. In the context of this petition s 35(b) enable this court to grant order in terms of prayer 1, ie that third respondent 'was not duly elected or ought not to have been returned'. This court does so declare as prayed in prayer 1 of the petition pursuant to s 35(b) of the Act with costs. Prayer 2 of the petition is not granted. This court will certify this determination to the Election Commission in due course pursuant to s 36(2)(a) of the Act.

[14] As a postscript I would like to address a query posed by the counsel of the petitioner and third respondent, ie should there be a by-election as the court did not declare the election void under s 32(a) of the Act? Firstly, there was no such declaration by this court as the petitioners did not pray for such a declaration. This is understandable in the light of petitioner's prayer 2. A declaration that the election is void would negate prayer 2 of the petition. Secondly, all the available reliefs as provided in s 32 of the Act are to be read disjunctively and not conjuctively, ie they can be granted separately and not necessarily together. As this court granted order in terms for prayer I of the

Petition, effectively there is a vacancy in the constituency of Dewan Undangan Negeri N15, Sanglang, Perlis.

[15] When there is a vacancy in the Dewan Undangan Negeri, that vacancy must be filled within 60 days from the date it is established by the Election Commissions that there is a vacancy. This is provided in art 55(5) of the Laws of The Constitution of Perlis which reads:

> A Casual vacancy shall be filled within sixty days from the date on which it is established by the Election Commissions that there is a vacancy:
>
> Provided that if a casual vacancy is established on date within two years of the date the Legislative Assembly shall in accordance with clause (3), stand dissolved, such casual vacancy shall not be filled unless the Speaker notifies the Election Commissions in writing that the numerical strength of the party that constitutes a majority of all the members of the Legislative Assembly is being affected by such vacancy, in which event such vacancy shall be filled within sixty days from the date of the receipt of the notification.

[16] The proviso of that article do not apply to the circumstances of this petition. Upon being certified of the determination of the petition by this court under s 36(2) of the Act, the Election Commission is thus obliged to issue a writ of election under s 12 of the Election Act 1958 to the returning officer of the said constituency directing him to proceed to hold a by-election. The writ is the instrument issued by the Election Commission authorising the returning officer to conduct the by-election on date as specified in the writ. As provided in art 55(5) the by-election must be conducted within 60 days from the vacancy in that constituency.

Order granted that the third respondent was not duly elected or ought not to have been elected.

Reported by Andrew Christopher Simon